

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANTHONY CHARLES DENNING

Claimant

v.

PICKRELL DRILLING COMPANY INC.

Respondent

and

HDI-GERLING AMERICA INSURANCE COMPANY

Insurance Carrier

Docket No. 1,067,610

ORDER

Respondent requests review of the March 9, 2015¹ preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Claimant appears by Lawrence M. Gurney. Respondent and insurance carrier (respondent) appear by Vincent A. Burnett.

ISSUES

The ALJ found claimant sustained personal injury by accident arising out of and in the course of his employment on August 10, 2013, and that claimant's accident caused a change in the physical structure of claimant's body, namely the movement of a preexisting right knee osteophyte or calcified loose body. The ALJ relied on the opinions of the court-ordered physician, Dr. Peter Bieri, that claimant's accident was the prevailing factor causing his current symptoms and need for treatment. The ALJ ordered respondent to provide medical treatment for claimant's right knee and temporary total disability benefits.

Respondent contends the calcification in claimant's right knee was present before the accident, which did not cause a new lesion or change in the physical structure of claimant's body. Respondent also maintains claimant did not prove his accident was the prevailing factor causing his injury, medical condition and resulting disability or impairment. Respondent requests reversal of the ALJ's decision.

Claimant argues the Board has consistently found accidental injuries compensable under the New Act when there is a new physical finding or change in physical structure of

¹ The preliminary hearing Order is mistakenly dated March 9, 2014.

the body. Claimant contends² the dislodgement of the osteophyte in his knee caused his symptoms and constituted a change in the physical structure of his knee. Claimant requests the Board affirm the ALJ's order.

The sole issue presented to the Board is: did claimant sustain personal injury by accident arising out of and in the course of his employment, including whether claimant's alleged accident was the prevailing factor causing his injury and need for medical treatment?

FINDINGS OF FACT

Prior to the alleged injury in this claim, claimant injured his right knee working for another employer on November 13, 1997. Kenneth A. Jansson, M.D., an orthopedic surgeon, treated claimant's knee from 1997 until 2005. Dr. Jansson performed several surgeries on claimant's right knee, including an ACL reconstruction, multiple ACL revisions and partial medial and lateral meniscectomies.

At his final appointment with claimant in 2005, Dr. Jansson diagnosed a deficient right knee anterior cruciate ligament, with a probable fourth failure of grafting and advancing osteoarthritis. Claimant's right knee x-rays showed significant osteoarthritis and collapse of the right medial joint with osteophyte formation. Other than office visits for pain medication with claimant's personal physician, Dr. Denis D. Knight, on May 18, 2011, and November 17, 2011, claimant received no treatment for his right knee from 2005 to August 2013.

Claimant alleged a right knee injury working for respondent on August 10, 2013. Claimant stepped down with his left foot, slipped and fell forward on his right knee. Claimant's knee hit the corner of a metal step. He experienced immediate pain and subsequent swelling.

Claimant saw Randall K. Hildebrand, M.D., an "orthopedic consultant,"³ for evaluations on September 4 and 11, 2013. Dr. Hildebrand's report states:

He does have significant post-traumatic degenerative changes related to previous injuries but these symptoms have been stable until this current work injury. He does have a large osteophyte loose fragment which was not caused or formed at the time of his current injury but on a more likely than not basis was shifted into a symptomatic position as a result of this slip and knee injury at work. In my

² The record contains no testimony--only statements of counsel and medical records and reports.

³ P.H. Trans., Resp. Ex. 1, Dr. Bieri's November 11, 2014, report at 2. Note to counsel: for future reference, please mark individual medical reports and records separately and not lumped into one large exhibit.

professional opinion, based on more likely than not probability his current symptoms are related to this loose body which shifted in position after the work injury. His slip at work was the prevailing factor in causing or activating this condition and as a result I recommend proceeding with arthroscopic evaluation and removal of the loose body. This would not be done to address preexisting degenerative changes.⁴

Pat Do, M.D., an orthopedic surgeon, evaluated claimant on January 29, 2014, at the request of respondent's attorney. Dr. Do reviewed an MRI conducted on September 11, 2013, which showed the previous ACL graft was intact; advanced degenerative arthritis; a loose body in the knee; and a possible tear of the medial meniscus. Dr. Do's diagnostic impression was claimant had right knee pain with advanced degenerative arthritis and a loose body in the knee with likely degenerative meniscal pathology. In Dr. Do's opinion, claimant's "current need for treatment is a natural and probable consequence of posttraumatic arthritis and issues he had relating back to his knee even back to 1998 and not causally related to his recent injury of August 10, 2013."⁵

On November 11, 2014, Peter V. Bieri, M.D. evaluated claimant at the request of the ALJ. Dr. Bieri opined:

Based on history, documentation, and the results of clinical examination, I would conclude that the injury on or about August 10, 2013 is the prevailing factor for the current symptomatology involving the right knee. The pre-existing condition included the presence of the calcified loose body, but the mechanism of injury itself resulted in migration resulting in the current findings.⁶

Drs. Hildebrand, Do and Bieri took histories, reviewed radiographic studies and medical records and conducted physical examinations.

Claimant provided consistent medical histories about his accidental injury of August 10, 2013.

PRINCIPLES OF LAW AND ANALYSIS

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁴ P.H. Trans., Resp. Ex. 1, Dr. Hildebrand's October 31, 2013, report.

⁵ P.H. Trans., Resp. Ex. 1, Dr. Do's January 29, 2014, report at 2.

⁶ P.H. Trans., Resp. Ex. 1, Dr. Bieri's November 11, 2014, report at 5.

⁷ K.S.A. 44-534a(a)(2).

as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

K.S.A. 2013 Supp. 44-508(d) states:

“Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) states:

(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2013 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The Board agrees with the ALJ and affirms her preliminary hearing Order of March 9, 2015.

There is no serious dispute that claimant sustained an accident on August 10, 2013. The focus is whether claimant's accident caused his injury and whether the "prevailing factor" requirement has been proven.

The evidence establishes claimant experienced immediate pain and subsequent swelling in his right knee after the accident. Since the accident, he has experienced episodes of the knee "locking," accompanied by marked increases in pain.⁸ The record reveals that other than office visits for pain medications with claimant's personal physician, Dr. Denis D. Knight, on May 18, 2011, and November 17, 2011, claimant sought no medical treatment between 2005 and August 2013. The medical opinions regarding causation are conflicting. However, the preponderance of the medical evidence proved claimant's accident caused a change in the physical structure of the knee by causing "a large loose body in his knee,"⁹ to "relocate." Dr. Bieri referred to the movement of the osteophyte as "mobilization of the previously existing calcified body."¹⁰ Dr. Hildebrand referred to the same phenomena as "shift[ing] into a symptomatic position."¹¹

Respondent contends claimant's current symptoms and need for medical treatment are either a natural and probable consequences of claimant's 1997 injury or were caused by claimant's preexisting advanced arthritis in the right knee. The evidence does show that before the August 2013 accident, claimant had advanced arthritis in his right knee, a history of multiple right knee surgeries, and the presence of a loose body within the knee. However, Dr. Hildebrand opined the migration of the loose body was caused by "this slip and knee injury at work," and that claimant's "current symptoms are related to this loose body which shifted position after the work injury."¹² According to Dr. Hildebrand, claimant's "slip at work was the prevailing factor causing or activating this condition . . ."¹³

Moreover, the Board is persuaded by the opinions of Dr. Bieri, the court appointed neutral physician. In Dr. Bieri's opinion, the mechanism of claimant's injury was consistent with acute trauma and mobilization of the previously existing calcified body, resulting in the intermittent obstruction of the right patellofemoral joint, causing locking, increased pain and swelling.

⁸ P.H. Trans., Ex. 1, Dr. Bieri's November 11, 2014, report at 1-2.

⁹ P.H. Trans., Ex. 1, Dr. Do's January 29, 2014, report at 2.

¹⁰ P.H. Trans., Ex. 1, Dr. Bieri's November 11, 2014, report at 5.

¹¹ P.H. Trans., Ex. 1, Dr. Hildebrand's October 31, 2013, report at 1.

¹² *Id.*

¹³ *Id.*

Claimant's injury was not a sole aggravation of a preexisting condition or the making of a preexisting condition symptomatic. Claimant striking his knee on the step corner, causing the osteophyte to move and cause pain was not the result of a preexisting condition. Claimant sustained a new lesion or change in the physical structure of his knee because the accident caused an existing bony growth to migrate within the knee, causing claimant's symptoms and need for medical treatment.

CONCLUSIONS

Claimant sustained personal injury by accident arising out of and in the course of his employment and claimant's accident was the prevailing factor causing his injury and need for medical treatment.

DECISION

WHEREFORE, the undersigned Board Member finds that the Order of Administrative Law Judge Pamela J. Fuller dated March 9, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
fdesk@ksworkcomplaw.com
larry@ksworkcomplaw.com

Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
vburnett@McDonaldTinker.com

Honorable Pamela J. Fuller, Administrative Law Judge